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Via ECFS

Eliot Greenwald
Deputy Chief
Disability Rights Office
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Misuse of Confidential Designations in Ex Parte Notices in CG Docket Nos. 10-51 and 03-123

Dear Mr. Greenwald:

I write on behalf of Sorenson Communications, LLC ("Sorenson") with respect to a troubling repeated pattern of violations of Federal Communications Commission ("FCC" or "Commission") rules on ex parte, electronic filing, and confidentiality in a series of recent filings by Purple Communications ("Purple") and other video relay service ("VRS") providers.[1] These written ex parte filings, which also memorialize oral ex parte presentations, contain proposals in an open rulemaking proceeding for changes to the FCC's VRS rate structure, as well as what appear to have been financial projections or estimates related to the operations of some or all VRS providers. The proposal and accompanying information have apparently been shared among all VRS providers other than Sorenson. However, information related both to the proposed regulatory changes and to the widely shared financial information is redacted from the non-electronically filed, public version of these filings, pursuant to naked, unsubstantiated assertions of the confidential commercial information provisions of 47 C.F.R. §§ 0.457 and 0.459.

Submitting overly redacted versions of these filings pursuant to 47 C.F.R. §§ 0.457 and 0.459 was plainly improper, and a violation of the ex parte rules applicable to a "permit-but-disclose" rulemaking proceeding. The proposed revisions to the FCC's VRS rate structure could not possibly be confidential under any standard, and thus submitting them only in redacted form

[1] The filings are as follows: Letter from Michael Strecker, VP of Regulatory and Strategic Policy, Purple Communications, Inc. to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51, 03-123 (filed Oct. 24, 2016) ("Oct. 24 Ex Parte"); Letter from Michael Strecker, VP of Regulatory and Strategic Policy, Purple Communications, Inc. to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51, 03-123 (filed Nov. 3, 2016); Letter from Michael Strecker, VP of Regulatory and Strategic Policy, Purple Communications, Inc. and Jeff Rosen, General Counsel, Convo Communications, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 10-51, 03-123 (filed Nov. 17, 2016).

does not meet the requirements of the ex parte rules.[2] Filers must place their proposals on the public record, or have them made available for review under protective order, if the Commission is to consider them in any way. Moreover, to the extent that any of the financial information contained in the filings qualifies as confidential commercial information, § 0.459 requires the filers specifically to detail the reasons for withholding the materials from public review, including the extent to which the material has been shared with third parties and the steps taken to protect the confidentiality of the materials. Last, Purple has violated the ex parte rules by failing to file the redacted version of these ex parte notices electronically on the Electronic Comment Filing System ("ECFS"), with the result that Sorenson and other interested parties do not learn of these presentations for a week or more.

Sorenson has informally brought these violations to the attention of Purple, Convo, and CSDVRS, but these violations continue. Accordingly, we ask that the Consumer and Government Affairs Bureau ("Bureau") either (1) require the submitting parties to file revised public versions of the filings that reveal the filers' proposals for Commission rulemaking and all information already shared among competing VRS providers' personnel involved in competitive decision-making, and (if any material remains redacted) make fully unredacted copies under the Protective Order already in this docket, or (2) in the alternative, strike these filings from the record and not take any information from these filings into account when setting VRS rates.

1. Proposals regarding what VRS rate structure the FCC should adopt belong on the public record and are not themselves commercial or financial information of any party.

Under any standard, Purple and other providers' proposals regarding what VRS rate structure the FCC should adopt belong on the public record. These are proposals for a going-forward, generally applicable rate structure and set of rate levels. As such, these proposed rates are not financial or commercial information of any submitting party.

There is no plausible justification for characterizing proposed agency action as confidential commercial information. Information that is submitted "advocating a position to the [agency] and clearly intending to affect its decision, [is] precisely the kind of information that would shed light on agency decision-making" and "[t]o categorize this information as 'commercial' and therefore exempt would contradict [the Freedom of Information Act's] strong policy in favor of disclosure."[3] If the rate proposal is favored by the Commission, moreover, it would necessarily be a public part of any future Notice of Proposed Rulemaking or final order establishing rates. In other words, Purple's proposal to the FCC is not only the type of information customarily released to the public, but Purple, on behalf of other providers, provided

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[2] In any event, filers must place their proposals on the public record, or have them made available for review under protective order, if the Commission is to consider them in any way. *See* 5 U.S.C. § 553(c) (parties must have opportunity to participate in any rulemaking); *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 202 (5th Cir. 1989) (finding that parties must have meaningful opportunity to comment information the agency relies on for rulemaking), *decision clarified on reh'g*, 885 F.2d 253 (5th Cir. 1989).

[3] *N.Y. Pub. Interest Research Grp. v. EPA*, 249 F. Supp. 2d 327, 334 (S.D.N.Y. 2003).

rate structure proposals *with the precise goal of those proposals eventually becoming public* by being adopted by the Commission or incorporated into a Notice of Proposed rulemaking.

And the information itself has not been kept confidential. Information voluntarily submitted to the FCC as part of an ongoing proceeding is confidential if it is "of a kind that would customarily not be released to the public by the person from whom it was obtained."[4] In the first instance, the rate proposal may no longer be confidential because it has been shared among the four VRS competitors, and Purple has made no showing that such sharing occurred pursuant to a non-disclosure agreement or other confidentiality assurances.

2. The filing parties have failed to demonstrate that any of the other redacted information qualifies as confidential commercial information.

It is unclear whether *any* of the financial information that Purple redacted from its filings constitutes confidential commercial information. Under any standard, Purple bears the burden of demonstrating that any commercial information for which it seeks protection has, in fact, been kept confidential. Parties seeking confidential treatment for submissions under § 0.459 must file a request that includes an "identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties."[5] Exemption 4 of the Freedom of Information Act ("FOIA") only protects information that is of a kind "not customarily released to the public."[6]

Although ordinarily a company that is not traded on public exchanges might not disclose financial projections, in this case, the submitting parties appear to have disclosed the information contained in this ex parte to each other—and the submitting parties represent four out of the five direct competitors in the VRS market. Unless these competitors demonstrate that they disclosed such information pursuant to a non-disclosure agreement or other enforceable confidentiality assurances, the Commission should not treat such information as having been kept confidential.[7]

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4 *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992).

5 47 C.F.R. § 0.459(b)(7).

6 *Critical Mass Energy Project*, 975 F.2d 871, 879 (1992); *see also Amster v. Baker*, 145 A.3d 1, 12 (Md. Ct. Spec. App. 2016) (finding that the FOIA exemptions "including the confidential commercial information exemption, do not cover information that is already well known to the public" (internal quotations omitted)).

7 The Commission should also reject Purple's request for confidentiality as it does not conform with the procedural requirements for submitting such requests. Submitting parties must include in their requests "a statement of the reasons for withholding materials from inspection . . . and of the facts upon which those records are based." 47 C.F.R. § 0.459(b). Particularly, the submitting party must at least give an explanation, among other things, of (1) the degree to which the information is commercial or financial, (2) how the disclosure of the information could result in substantial competitive harm, and (3) the extent of disclosure to third parties. *Id.* Instead, in each of the ex parte notices, Purple, on behalf of itself and the

3. If the filings contain financial information that qualifies as confidential commercial information, they should be filed under the Protective Order and made available pursuant to those terms.

Assuming for the sake of argument that the filings contain financial information that qualifies as confidential commercial information, Purple must submit that information pursuant to the Protective Order, not §§ 0.457 and 0.459, for the Commission to consider it when setting VRS rates. Sorenson, advocacy groups for individuals with disabilities, entities that contribute to the Fund, and other parties interested in the VRS rate structure will never have access to—and will be powerless to comment upon—information that the Commission deems entitled to protection under §§ 0.457 and 0.459. In contrast, interested parties can access and comment upon information submitted pursuant to the Protective Order, provided they sign and comply with its terms.[8]

This difference is essential. Absent public disclosure or disclosure subject to a protective order, agencies may not use confidential information to promulgate regulations.[9] Unlike information submitted pursuant to the Protective Order, the Commission cannot rely on information submitted pursuant to §§ 0.457 and 0.459 when setting the VRS rates, because doing so would deprive parties of "any meaningful opportunity to comment on" the material used as a basis for the rule.[10]

The facts here present a textbook case for why the FCC should not and cannot rely on information that is completely unavailable to interested parties when engaging in rulemaking. Here, four of five direct competitors have shared sensitive information with one another. This information appears to have been shared among in-house personnel.[11] These competitors are

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other VRS providers, merely notes that the information redacted "is proprietary commercial and business information that is not customarily disclosed to the public and is subject to Exemption 4 under the Freedom of Information Act" without further elaboration or justification. *See, e.g.*, Oct. 24 Ex Parte.

[8] *See Structure & Practices of the Video Relay Serv. Program; Telecomms. Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, Protective Order, DA 12-402, 27 FCC Rcd. 2557, 2559 ¶ 5 (Consumer & Gov't Affairs Bur. 2012).

[9] *See Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 202 (5th Cir. 1980) (noting that an agency has a duty to publish data, absent unusual circumstances, but allowing the EPA's rules to stand given that the EPA offered to make it possible for parties to view the confidential information relied upon on an "in camera" basis), *decision clarified on reh'g*, 885 F.2d 253 (5th Cir. 1989).

[10] *Penobscot Indian Nation v. HUD*, 539 F. Supp. 2d 40, 49 (D.D.C. 2008); *see also* 5 U.S.C. § 553(c).

[11] While they do not specify the scope of such sharing, it seems likely that the information was shared among parties involved in competitive decision-making, since disclosure involved the General Counsels of at least two providers (Greg Hlibok of CSDVRS and Jeff Rosen of

presumably asking the Commission to adopt a VRS rate structure that disadvantages the one competitor with whom the relevant financial information is being withheld. This type of collusion is antithetical to a competitive VRS market and to balanced ratemaking that takes into consideration reasoned arguments from all providers, consumer groups, and other interested parties. Thus, if Purple wants the Commission to take its financial circumstances—and the financial circumstances of three of its four competitors—into consideration when setting VRS rates, it should re-file its unredacted ex parte materials under the Protective Order, not §§ 0.457 and 0.459.

4. Purple has failed to give Sorenson and other interested parties timely notice of these filings.

Purple has been compounding its abuse of confidentiality to circumvent the ex parte disclosure rules by failing to make timely electronic filings of its requests for confidential treatment and appropriately redacted versions of its written ex partes. Rule 0.459(a)(2) and the ex parte disclosure rules requires, in electronic filing dockets, for parties to submit a request for confidential treatment and redacted version the ex parte notice through electronic filing, and not on paper, within two business days of the meeting.[12] Purple instead has been filing its ex parte notices in paper format, rather than through ECFS. As a result, the submissions do not appear to the public until after the Commission has scanned and uploaded the notices online; Sorenson has only been made aware of its competitors' covert ex parte meetings with the Commission weeks after the fact.

* * *

Convo), and the Vice President of Regulatory and Strategic Policy of a third (Mike Strecker of Purple).

[12] *See* 47 C.F.R. §§ 0.459(a)(2), 1.1206(b)(2)(ii).

Accordingly, Sorenson respectfully requests that the Bureau either (1) require the submitting parties to file revised public versions of the filings that reveal the filers' proposals for Commission rulemaking and fully unredacted copies under the Protective Order as provided for under the above-referenced proceedings or (2) in the alternative, strike these filings from the record and not take any information from these filings into account when setting VRS rates.

Sincerely,

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